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No. 89-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT R. FREEMAN, *et al.*,
Petitioners,

v.

WILLIE EUGENE PITTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondents have abandoned the legal theory on which they prevailed in the court of appeals. They no longer dispute that petitioners are correct, as a matter of law, with respect to the first question presented in petitioners' brief, *viz.* whether the court of appeals erred in imposing an "affirmative duty" to remedy the segregative effects caused by massive demographic changes. Rather, having prevailed on a legal theory that they are now unwilling and unable to defend in this Court, respondents distort both the factual record and precedent in an effort to supply some justification for the court of appeals' order massively expanding the desegregation decree—notwithstanding petitioners' 22 years of compliance with the existing remedial plan.

This is *not* a case where petitioners are seeking immediate dissolution of a federal court decree. Instead, petitioners simply ask the Court to overturn the court of appeals' holding that petitioners are obligated to "eradicate segregation caused by demographic changes" (Pet. App. 20a), and thereby reinstate the judgment of the district court.[1]

[1] The district court found that the racial imbalance in student assignment that exists today is unrelated to any conduct of the DCSS either prior or subsequent to the entry of the 1969 decree. See Pet. Br. 14-15. The court therefore declined to mandate further relief in the area of student assignment. The court held, however, that it would not dismiss the case completely until the petitioners (1) had eliminated disparities in resources allocated to "types" of schools and (2) had "balanced" more fully the racial composition of faculty and administrators at schools throughout the system. See Pet. Br. 16-17 & n.19; see also pp. 11-12 nn.10-11, *infra*. By vacating the judgment of the court of appeals, which imposed a whole new set of remedial requirements, this Court would affirm the district court's decision to terminate the student assignment portion of the decree and permit that court to consider whether the petitioners' recent submissions now justify an order dissolving the decree in its entirety. See Brief of United States as *Amicus Curiae*, at 9-21 ("U.S. Br.").

ARGUMENT

The district court found that, with respect to student assignment, petitioners' compliance with the 1969 desegregation decree "effectively desegregated the DCSS for a period of time." J.A. 212. The court also found that, subsequent to the imposition of the decree, petitioners had done everything they reasonably could to maintain "maximum practical desegregation" in student assignment, despite the effects of massive demographic shifts in residential housing patterns. *Id.* at 220, 218-24. Thus, the district court concluded that, in the area of student assignment, the characteristics of the previous dual system "have been eradicated, or if they do exist, are not the result of past or present intentional segregative conduct by [petitioners] or their predecessors," and further relief therefore is unwarranted. *Id.* at 224.

The court of appeals reversed, but it did *not* reverse any of the district court's crucial factual findings. Instead, the panel held that further relief must be ordered until petitioners have fulfilled their "affirmative duty" to achieve and maintain simultaneous "racial balance" in all aspects of school operations for a minimum three-year period. Pet. App. 24a.

Respondents ignore the court of appeals' legal theory and seek to sustain the judgment by means of two new and alternative arguments. First, respondents directly attack the district court's finding that current racial imbalance is *not* attributable to (or, stated differently, is not a "vestige of") either the prior dual system or any failure by petitioners to comply with the decree. Resp. Br. 20, 27-30, 46-47; see *infra* pp. 2-13 (Section A). Second, respondents suggest that the district court's findings were somehow "tainted" by the incorrect application of legal principles. Resp. Br. 19, 30-46; see *infra* pp. 13-19 (Section B).

A. The core of respondents' "factual" argument is that current racial "imbalance" in student assignment is a "vestige" of the prior dual school system. Resp. Br. 45.

In fact, DCSS has been operated, pursuant to federal court order, in full compliance with a "student assignment system" that had been consistently endorsed by respondents throughout the last 22 years. It is only in this Court that respondents assert that the 22-year-old remedial decree has been inadequate.

1. Respondents' belated attack on the factual findings of the district court should be rejected because the question whether those findings were "clearly erroneous" was not pressed by respondents nor passed upon in the Eleventh Circuit and therefore should not be resolved by this Court. *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (issue not raised in court of appeals is not properly before the Court); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927) (court generally will not consider "questions not pressed or passed upon below").

Respondents, for strategic reasons, sought in both courts below to press for a broad legal ruling establishing an "affirmative duty" to maintain racial balance, regardless of the "cause" of any imbalance. See Brief for Plaintiffs/Appellants, at 15, 25-28. The factual findings that petitioners argued were central to the legal issue posed were irrelevant to respondents' analysis because, according to the legal theory they advocated in the Eleventh Circuit, petitioners were obligated to maintain a "school system in which maximum feasible desegregation has occurred, not simply a system in which all vestiges of the former dual system have been eliminated." *Id.* at 28; see *id.* at 15 ("[c]ontrary to established precedent, the district court examined the vestiges of the dual system, and held defendants responsible for correcting only those which defendants intentionally caused"). Having pursued the strategic choice of seeking a broad legal ruling, respondents should be estopped to pursue an alternative course that they disavowed in the court below—*i.e.*, claiming now that the district court's findings are "clearly erroneous." See, *e.g.*,

Partenweederei v. *Weigel*, 313 F.2d 423, 425 (9th Cir. 1962), *cert. denied*, 373 U.S. 904 (1963).[2]

2. Respondents also have conceded previously that the district court's findings were correct. For example, the district court noted:

> Plaintiffs concede that "the closing of the black schools in 1969 did, for a time, result in the desegregation of the schools of DeKalb County. . . ."

J.A. 210 (quoting Plaintiffs' Trial Brief, at 7); see J.A. 212 ("[P]laintiffs concede that" the 1969 order "effectively desegregated the DCSS for a period of time"). The district court also observed that respondents had conceded the central issue of the "causation" of subsequent racial imbalance in certain DCSS schools:

> Plaintiffs concede that the racial segregation in DeKalb County is the result of demographic shifts.

J.A. 210; see Brief for Plaintiffs/Appellants, at 25 ("[n]o one contends that defendants caused the population growth of DeKalb County, or that defendants could or should have exercised some control over the race or placement of the new residents"). Respondents' thirteenth-hour attack on the previously conceded factual findings of the district court should be rejected.[3]

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[2] Although petitioners obviously agree with the United States' analysis of the case, as set forth in its Brief *Amicus Curiae*, petitioners disagree with the United States' suggestion that "this Court should remand the case to the court of appeals with instructions that it review the[] [factual] findings [of the district court] under the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)." U.S. Br. 21. Because the United States was not involved in the case before the Eleventh Circuit, the United States could not be expected to know, at the time it submitted its brief in this Court, that respondents intentionally had waived that argument in the Eleventh Circuit. In light of respondents' waiver, however, the course suggested by the United States would not constitute a proper disposition of this case. Rather, the judgment of the court of appeals should be vacated and the district court's more circumscribed judgment upheld. See *supra*, n.1.

[3] See *United States ex rel. Huisinga* v. *Commanding Officer*, 446 F.2d 124, 125-26 (8th Cir. 1971) (party precluded from challenging on appeal issue that had been conceded); see also *Miami Parts & Spring, Inc.* v. *Champion Spark Plug Co.*, 402 F.2d 83, 84 (5th Cir. 1968).

3. Even if this Court were to reach the "merits" of respondents' factual arguments, the district court's conclusion that demographic factors—not the conduct of petitioners—are the sole cause of racial imbalance in student assignment is amply supported by the record.

a. First, respondents argue that following the implementation of the 1969 decree "DCSS was not, in fact, desegregated . . . ." Resp. Br. 1. The undisputed fact is that the 1969 order mandated that all former *de jure* black schools be closed and all students be assigned to schools pursuant to the strict system of neighborhood attendance zones, established by the United States Department of Health, Education and Welfare ("HEW"). J.A. 64-65; see *infra* p. 6. This race-neutral method of student assignment has been faithfully adhered to since 1969. See Pet. Br. 30-32.

Respondents, however, complain that the 1969 decree was inadequate *ab initio* because it resulted in a greater than "permissible variance" in racial balance at some schools. Resp. Br. 3 & n.1. However, with two exceptions, none of the DCSS schools had majority black student populations following implementation of the 1969 order.[4] Given respondents' admission that some "variance" from the systemwide average of 5.6% black student population was permissible—perhaps "plus or minus

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[4] The fact that 2 out of 97 formerly white schools (Stoneview and Terry Mill Elementary Schools) had a greater than 50% black population in the years immediately after the entry of the decree does not demonstrate that the district court erred in holding that the *de jure* dual school system had been disestablished. This Court has held that, even in the early remedial stage, "the existence of some small number of one-race, or virtually one-race schools"—not just "majority" black, but all-black schools—"is not in and of itself the mark of a system that still practices segregation." *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 26 (1970); see Pet. Br. 5 n.6, 32-33; *cf.* U.S. Br. 10 n.5.

15%" (Resp. Br. 3 n.1)—statistical arguments demonstrating that a small percentage of schools had "twice as many black students as the systemwide average" (Resp. Br. 3) hardly constitute a significant, much less fatal, assault on the district court's factual finding that the DCSS "achieved racial parity in the area of student assignment on the day it closed the *de jure* black schools" in 1969. Pet. App. 20a.

Respondents, by focusing on "racial imbalance" as a statistical fact, overlook the controlling principle that the success of a desegregation decree cannot be measured by a statistical examination of "conditions" but requires careful inquiry into whether those conditions are the result of "present or past discriminatory action" on the part of the school system. See *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 434 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24, 26 (1970).[5] The proper test of the effectiveness of the 1969 student assignment remedy must focus not on the static picture of "conditions" but on whether the remedial order "restore[d] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 418 U.S. 717, 746-47 (1974). In this case, the violation—the maintenance of separate, overlapping "dual" school systems—was wholly cured by abolishing entirely the black school system. Pet. Br. 5.

Because black students in DCSS in 1969—the "victims of discriminatory conduct"—were a small percentage of the total student population and because black students were relatively dispersed geographically, HEW was able to construct a simple, logical system of neighborhood-based attendance zones that effectively integrated black

[5] One substantial difference between the parties' relative positions in the Eleventh Circuit was that respondents expressly rejected the need for an inquiry into causation in order to distinguish remediable "vestiges" from non-remediable "conditions." See Response of Plaintiffs/Appellants/Cross-Appellees, at 7 ("the words 'vestige,' 'characteristic' and 'condition' . . . were used interchangeably by [respondents] in the first brief").

students into the post-1969 school system. It was not necessary to undertake the arduous task of "upgrading" holdover black schools or constructing new schools, nor was there any need to engage in gerrymandering of attendance zones or massive transportation of students. See Pet. Br. 30. Instead, black students in the DCSS in 1969 immediately were admitted into the schools that they would have occupied in the absence of the "dual" school system, and DCSS "achieved racial parity" in student assignment. Pet. App. 20a. Thus, there was overwhelming evidence to support respondents' concession and the district court's finding that the 1969 remedial order was effective in remedying the effects of the prior dual system. *Id.*; see J.A. 209-21, 573-85.

b. Second, as an alternative factual argument, respondents assert that "massive demographic change" in DeKalb County did not occur until 1975 and that "the primary increase in racial segregation in DCSS schools occurred" prior to that time, thereby suggesting that DCSS—not demographic change—is responsible for "the amount of segregation in DCSS schools." Resp. Br. 4-5, 11. This argument relies on a manifestly incorrect characterization of DCSS' demographics; in fact, the black student population in the DCSS has increased at a rapid and *steady* rate since 1969. See J.A. 214-15, 155-58.[6]

As evidence of the conduct of petitioners that "perpetuated" segregation in the DCSS schools from 1969-75, respondents assert that petitioners' changes in elementary school boundary lines caused racial imbalance. Resp. Br. 10. In support of this position, respondents grossly distort the district court's 1976 opinion to suggest that

[6] In the period in which respondents downplay the rate of demographic change (1970-75), the percentage of black students in the overall DCSS student population more than doubled (from 6.44% to 17.34%). Def. Ex. 193. In the period in which respondents identify "massive" demographic change, the percentage of black students in the overall DCSS student population almost doubled again (from 17.34% to 32.26%). *Id.* See Brief for Plaintiffs/Appellants at 15 ("the demographic changes . . . began to take place in the county contemporaneously with the 1969 desegregation order").

boundary changes adopted by the DCSS had the "total effect" of ensuring

> that one predominantly white school, Cedar Grove, would remain predominantly white for a number of years . . . [It] perpetuat[ed] a dual system.

Resp. Br. 10 (quoting J.A. 89). Thus, respondents assert that "[it]"—*i.e.*, the petitioners' change in boundary lines—"perpetuated" the "dual system" and "expanded the amount of segregation in DCSS schools." Resp. Br. 10-11.

In fact, review of the district court's opinion—without respondents' misleading use of brackets and ellipses—leads to precisely the opposite conclusion:

> At the time these attendance zone changes were made, the Cedar Grove site had already been chosen, and the choice was made at a time when the racial composition of the area was almost completely white. As it developed, it was the location of this new school, accompanied by a transition in the residential patterns in the area, which had the effect of perpetuating a dual system, because the school site dictated to a large extent the placement of the new attendance lines. The propriety of the selection of the Cedar Grove site, however, is not in question.

J.A. 89. The court concluded that "because of the rapid residential transition occurring throughout this section of the county," it was "impossible to determine whether the zone changes" challenged by respondents "actually accelerated" or "had little effect on the process of desegregation which was in fact impeded by a natural process of residential transition." J.A. 92.[7] Thus, respondents' assertion that petitioners' school boundary decisions had a

[7] In rejecting respondents' request for attorneys' fees, the district court made clear that it had "declined to find that defendants were in violation of the 1969 order with regard to attendance zone changes, and ordered no changes in attendance lines." J.A. 113. Thus, the reason that "DCSS did not challenge these findings on appeal," see Brief of NAACP, *et al.*, as *Amici Curiae*, at 11 n.10 ("NAACP Br."), is that DCSS won.

segregative effect is based on a misleading "quotation" of the district court's opinion and is otherwise unsupported by the record. Resp. Br. 11.

4. Respondents' final "factual" attack suggests that even if the current lack of racial balance in student assignment is not *directly* attributable to the conduct of petitioners, their failure to achieve sufficient racial balance in faculty and administrative staff assignments and the assignment of "resources" to certain "types" of schools somehow "caused" the imbalance in student assignment. Resp. Br. 4, 7-8, 16-18, 27-34. This argument is flawed in several respects.

With respect to "imbalance" in faculty/staff assignment, the only *finding* of the district court was that petitioners had not achieved "compliance" with the so-called "*Singleton* requirement" (Pet. Br. 16) that the ratio of black faculty and staff in the individual schools be maintained at a level equivalent to the system-wide ratio. Pet. Br. 16 & n.15. The district court therefore held that petitioners would be required, *inter alia*, to achieve "*Singleton* compliance" (J.A. 249) before the "court w[ould] declare that the DCSS has obtained unitary status" in all respects. *Id.*[8]

Although respondents assert that there is "interconnectedness" between faculty/staff imbalance and student assignment (Resp. Br. 31), there are no factual findings —or citations to record evidence—that support such a causal link. Indeed, the suggestion that the minor statis-

[8] Respondents' assertion that this "imbalance" reflects a "failure to comply with" the 1969 order (Resp. Br. 21-22) is an outright misstatement of the record. Indeed, the district court held in 1976 that "defendants have more than complied" with the explicit faculty/staff assignment portion of the 1969 order. J.A. 84. The court did hold, however, that petitioners "have not taken adequate steps to utilize reassignment of teachers . . . *in accordance with the standard set out in*" the intervening Fifth Circuit decision in *Singleton*. J.A. 85 (emphasis added). Petitioners have now reported to the district court that they are in compliance with the *Singleton* requirement. Pet. Br. 17 n.19.

tical variations from system-wide racial balance in faculty/staff assignment at issue here would *cause* a change in housing patterns (which, in turn, would cause imbalance in student assignment, Resp. Br. 28) is ludicrous.[9]

With respect to the distribution of "resources," respondents condemn, in conclusory and excessive fashion, the supposed "inequality" of resources in DCSS schools as contributing to imbalance in student assignment. Resp. Br. 20 ("DCSS schools are both separate and unequal"); *id.* at 31 ("[s]chools that are racially identifiable as black . . . receive the fewest resources"); see NAACP Br. 25 n.32. However, the only basis for these assertions of "inequality" is a statistical analysis, prepared by respondents' expert, that purports to show that DCSS spends more "per pupil" in "white" schools (as identified by respondents, see Pet. Br. 16-17, n.17) than in "black" schools (as identified by respondents). See Resp. Br. 17.

This "statistical" disparity is in no way reflective of any invidious discrimination (past or present). To the contrary, it results from the fact that schools in the northern part of the county (with relatively smaller black student populations) had smaller overall student populations; conversely, schools in the southern part of the county had larger overall student populations because of the rapid residential growth in that area. See J.A. 214-15; Def. Ex. 193; Tr. Vol. V, pp. 209-10; Tr. Vol. VI,

[9] In all of the DCSS's schools in every year since 1976 (the year the "*Singleton* requirements" were imposed on DCSS), the record reflects only *two* instances where a DCSS school did not meet the annual "*Singleton* requirements" for faculty distribution, as ultimately defined by the district court and approved by the court of appeals (*i.e.*, a "permissible" variance of 15 percentage points from system-wide average). See Pl. Ex. 128; J.A. 550-551 (Gordon High School, with 72 teachers, out of compliance with "*Singleton* requirements" in 1977 and 1978 by a total of 7 teachers). Respondents cannot seriously contend that the replacement of 4 black teachers with 4 white teachers in 1977 and the replacement of 3 black teachers with 3 white teachers in 1978 in one school would have affected the course of student assignment throughout the entire school system.

pp. 152-54; Pet. Br. 33-34 n.27; see also J.A. 237 ("[t]he DCSS is constantly attempting to deal with the growing population of southern DeKalb County by building new schools and adding permanent additions to existing schools"). "Smaller" schools have the same *fixed* costs as large schools (*e.g.*, principals, band directors, maintenance staff and secretaries) and thus "smaller" schools will *statistically* reflect a larger cost-per-pupil. This statistical disparity has nothing to do with the average student's access to resources or quality of education in the DCSS and certainly does not constitute invidious discrimination.[10]

Indeed, the district court found that this statistical disparity in no way reflects actual educational opportunity or academic achievement. See J.A. 244, 247; Pet. Br. 16-17; see also J.A. 75 ("there is no apparent trend of superiority among any group of schools"). With respect to those concrete factors that *do* have a substantial impact on education, such as teacher-student ratio, there are more teachers per student in the schools that respondents identify as "black" than there are in the schools that respondents identify as "white." Tr. Vol. VIII, pp. 103-04; Tr. Vol. XI, pp. 70-71.[11] As the district court noted,

[10] The point can be demonstrated plainly by examples. Every school in DeKalb County has a single principal. If a principal in a 400 student school is paid $50,000 and a principal in a school of 1000 students is paid $50,000, then the per-pupil expenditure is $125 and $50, respectively. Although there would be a statistical disparity of $75 per pupil in this example, there obviously is no difference in the education the students receive in each school.

Nor is size the only explanation for this statistical disparity. For example, if the heating and air conditioning unit in an older school is less efficient (and the schools in the northern part of the county tend to be older), the annual electrical bill per pupil will be significantly higher than schools with newer, more efficient physical plants. But, if all students are educated in 72 degree classrooms, the students are being treated equally—despite the fact that DCSS allocates more dollars, on a per-pupil basis, to schools with older, less efficient physical plants.

[11] The NAACP's statement of "dismay" that petitioners provide "fewer teachers . . . to educate a greater number of black students"

the record demonstrates that, in a variety of contexts, black students in the DCSS have made greater educational advances than comparable black students nationally and comparable white students in the DCSS. J.A. 237-41; see Pet. Br. 16-17.

Finally, even *if* resource allocation was in some meaningful way "skewed" by race, respondents have not shown that such inequality of resources was causally linked, directly or indirectly, to racial imbalance in student assignment. Given the district court's factual finding that demographic factors—and *not* anything done by the DCSS—was the cause of racial imbalance in student assignment, respondents' argument that further relief in the area of student assignment is mandated by "inequality" in the distribution of faculty and resources must be rejected.[12]

(NAACP Br. 25) presumably is based on their counsel's unfamiliarity with the record.

[12] The arguments of respondents and their *amici* slight the very real difficulties petitioners face in operating this enormous school system in compliance with the district court's orders. For example, the respondents and their *amici* criticize the race-neutral policy of the School District that allows more senior school teachers to transfer to schools closer to their homes. This policy, however, has been integral to the School District's efforts to recruit and hire outstanding faculty, including black faculty. Because all teachers value the opportunity to transfer to schools near their homes, the policy helps the DCSS to retain successful teachers (who are in substantial demand), thereby allowing DCSS to provide an outstanding education to its students. See J.A. 248-49.

Of course, this transfer policy also has the effect of increasing the number of black teachers in schools in the southern part of the county and thereby creates "*Singleton*" problems. See *supra* p. 10 & n.9. If, however, the number of black teachers in some of the southern schools is reduced "too much," the DCSS faces complaints from black parents that their children are being deprived of an adequate number of role models. These kinds of practical problems reinforce the appropriateness of the Court's requirement of "good-faith compliance" with remedial orders—rather than the achievement of absolute racial balance advocated by respondents.

In sum, respondents' arguments in this Court attacking the district court's factual findings simply ignore the deference to which those findings are entitled. See *Anderson* v. *City of Bessemer*, 470 U.S. 564, 574 (1985); Fed. R. Civ. P. 52. The subtlety of the factual issues presented "counsels undiminished deference to the factual adjudications of the federal trial judges in cases such as these, uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit." *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 469-470 (1979) (Stewart, J., concurring); see *id.* at 457 n.6 (majority rejects "suggestion that this Court should play a special oversight role in reviewing the factual determinations of the lower courts in school desegregation cases").[13] In sum, respondents' factual arguments provide no basis for this Court to disturb the district court's findings of fact.

B. In addition to their attack on the factual findings of the district court, respondents raise a number of legal arguments that attack, at the margin, the district court's application of the controlling legal principles. See Pet. Br. 28-29. In doing so, respondents indirectly address the second question presented, *viz.* whether a school system must maintain "racial equality" in all six *Green* factors "*at the same time*" for "not less than three years" (Pet. App. 14a) before a remedial plan can be deemed successful with respect to any individual factor. See Pet. Br. 40-45; U.S. Br. 21-25; Resp. Br. 27-34.

1. Because of the "interconnectedness" of the various facets of school operations, respondents assert that the existence of remediable "vestiges" in any facet of school operations (in this case, faculty/staff and "resource" as-

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[13] Not only has District Judge O'Kelley been supervising this litigation for many years, but he heard all of the evidence on behalf of the three-judge court in *Armour* v. *Nix*, No. 16708 (N.D. Ga. Sept. 24, 1979); a case which sought inter-district relief in all of the public school systems in greater metropolitan Atlanta and which involved many of the same factual issues presented in this case. See Pet. Br. 11 n.11.

signment) mandates a "legal presumption" that existing racial imbalance in any other facet of school operations (in this case, student assignment) is automatically a "vestige" of the dual school system. Resp. Br. 30-31, 34. Respondents further assert that "in this case, the court never . . . made a finding that DCSS had met its burden of showing that there were no connections" between existing "imbalances" in student assignment and "imbalances" in other facets of school operations. *Id.* at 31. Therefore, respondents conclude that existing "racial imbalance" in student assignment within the DCSS must be deemed a "vestige" of *de jure* segregation. Resp. Br. 25.

This argument is fatally flawed because of respondents' failure to distinguish this case, which involves the *expansion* of the student assignment remedy in circumstances where petitioners have been operating under court order for the last two decades, from cases involving the imposition of a remedy upon an initial finding of liability. See Pet. Br. 28-29 & n.23. Respondents correctly note that cases such as *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973) and *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 536 (1979), suggest that the *Green* factors are "interrelated" or "interconnected" in establishing *liability* for a "dual" school system. See *Keyes*, 413 U.S. at 214. Nothing in those cases, however, supports the use of a "presumption" of "interconnectedness" (Resp. Br. 27) to justify an *expansion* of the remedy in one area (student assignment) based on the failure of the remedial decree to achieve "unitary status" in another area.[14]

[14] Indeed, given the length of time that the DCSS has been operating under federal court supervision, it would be fanciful to "presume" that the DCSS's conduct during those years "caused" racial imbalance. For the past two decades, DCSS has not been in a position to take any steps to affect student assignment—other than to comply with the decree. See *Ross* v. *Houston Indep. School Dist.*, 699 F.2d 218, 226-27 (5th Cir. 1983) (declining to apply *Keyes* presumption that racial imbalance was attributable to school authorities, where that imbalance "evolved principally during the time [the school system was] under a desegregation order"); *Georgia State Conference of the NAACP* v. *Georgia*, 775 F.2d 1403, 1415-16 (11th Cir. 1985) (*Keyes* presumption not applicable where no students presently in schools had ever attended *de jure* segregated schools).

Respondents' assertion of such a "presumption" essentially is another way of imposing the requirement that a school district must *simultaneously remedy* all facets of school operations—without reference to whether the condition (*i.e.*, "imbalance" in student assignment) is in fact attributable to the prior "dual system." The law, however, is to the contrary. This Court in *Spangler*, 427 U.S. at 436, made clear that the Pasadena school system's failure "totally [to] achieve [] [a] unitary system" did not undermine the school system's ability to achieve unitary status with respect to student assignment. See *id.* at 434.[15]

Finally, even if the "presumption" suggested by respondents existed, the petitioners have met their burden of overcoming the presumption. The district court found that the degree of "racial imbalance" in student assignment was attributable *solely* to massive demographic changes in the county and not to the "vestiges" of the dual system—whether or not such vestiges were "related" to any other facet of the school system. See Pet. Br. 14-15; J.A. 224 ("the characteristics of the 1954 dual

[15] Respondents complain that the incremental approach urged by petitioners and the United States (U.S. Br. 21-25) and approved by this Court in *Spangler* will lead to a parade of horribles, such as efforts by school districts to "remove geographic sections of a district from court order after they are 'desegregated.'" Resp. Br. 33. Of course, *Spangler* approved an incremental approach with respect to each *Green* factor on a systemwide basis 15 years ago. Yet, respondents can point to no evidence of any school district seeking to expand upon that ruling, much less point to any adverse effect actually caused by *Spangler*'s incremental approach. On the other hand, respondents totally ignore the significant injury to principles of federalism occasioned by the approach they urge that prevents school districts from obtaining any relief from a remedial decree on an incremental basis. See Pet. Br. 46; *Board of Educ.* v. *Dowell*, 111 S. Ct. 630, 637 (1991).

system have been eradicated, or if they do exist are not the result of past or present intentional segregative conduct by [petitioners]"). The "find[ing] that [the DCSS's] actions achieved maximum practical desegregation" in student assignment (*Id.* at 221), coupled with the previous finding on vestiges, are a complete answer to respondents' conclusory assertion that DCSS had not met its "burden" of demonstrating that additional student assignment relief was unwarranted.

2. Respondents argue that the district court erred in imposing the burden of proof on them, when as a matter of law, petitioners had the burden of demonstrating that they were entitled to release from further supervision in the area of student assignment. Resp. Br. 34-41. This argument plainly is belied by the record and opinion below.

Petitioners have never contested their obligation to prove that they effectively remedied the effects of the *de jure* system with respect to all of the *Green* factors. Defendants' Reply to Plaintiffs' Post Trial Brief, at 1-2. The district court clearly accepted petitioners' voluntary assumption of the burden of proof. At the outset of its opinion, the court stated that the "school system must show that it is unitary before it can be dismissed from court supervision." J.A. 204. The district court also stated that it would "determine whether the defendants have met their burden of proof." *Id.* The court further noted that the "parties have requested" that the court review all "six pertinent areas" of school operations, identified in *Green*, as well as the overall "quality of education" in the DCSS, "when determining if these defendants have met their burden of proof regarding whether the DCSS is now a unitary system." *Id.* at 206. The court never deviated from this assignment of the burden of proof in its decision below.[16]

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[16] Respondents' reliance (Resp. Br. 35-36) on the district court's observation that there was an absence of countervailing evidence on certain points is misplaced. Review of the district court's opinion makes clear that those observations merely are part of the court's review of petitioners' evidence. See, *e.g.*, J.A. 212-13.

3. Respondents' final argument is that the existing lack of "racial balance" in faculty/staff assignment and "resource allocation" demonstrates, apparently as a matter of law, that "DCSS has not complied in good faith with the 1969 order to desegregate . . . ." Resp. Br. 21-23.

This argument reflects a failure, that is evident throughout respondents' brief, to distinguish "good-faith compliance" with a desegregation decree from (1) achievement of racial balance in a particular aspect of school operations, and (2) elimination of "vestiges" of discrimination in all aspects of school operations. With respect to the first point, however, this Court's decision in *Spangler* held that an imbalance "in the racial mix" of some schools provided no basis for ordering further relief—absent proof that the imbalance was "in any manner caused by segregative actions chargeable to the defendants." *Spangler*, 427 U.S. at 435. Thus, "racial imbalance" alone cannot be evidence of the sort of bad faith non-compliance sufficient to justify the continuation, or expansion, of a desegregation decree. See Pet. Br. 29; U.S. Br. 19-20; *Board of Educ.* v. *Dowell*, 111 S. Ct. 630, 638 (1991).

With respect to the second point, there is no basis to conclude that the "imbalances" in faculty/staff assignment and resource allocation that the district court identified are "vestiges" of the former dual school system. See Pet. Br. 33-34 & n.27. Despite respondents' unsupported assertions to the contrary (see Resp. Br. 25), the district court did not *find* that those imbalances were in any way linked to the operation of the *de jure* school system. Even if those imbalances were "vestiges," however, *Spangler* makes clear that the lack of success in "totally achiev[ing] the unitary system," 427 U.S. at 436 —*i.e.*, eliminating vestiges in all aspects of operations— does not necessarily reflect an absence of good faith. See *Spangler*, 427 U.S. at 435, 437-38 & n.5 (school district that had established "a system of determining admission

to the public schools on a nonracial basis" had fulfilled its obligation to remedy the "previously racially discriminatory [student] attendance patterns" even though the school district had not sucessfully implemented other requirements of the decree).[17]

In this case, the district court made no finding that petitioners *ever* had refused to comply in good faith with the court's desegregation orders; in fact, its findings are precisely to the contrary. See J.A. 203-04 (court rarely asked to intervene in implementing desegregation decree); J.A. 248 (noting DCSS' success and dedication to providing equal and quality education "for all students"); J.A. 110 (DCSS has "able and effective school board and school administration who . . . are trying to obey the law"). There is no basis for respondents' suggestion that the district court's requirement of additional, limited relief in two areas mandates the conclusion that petitioners have acted in bad faith in desegregating the schools throughout the district.

Moreover, for all of their efforts to portray petitioners as venal, respondents and their *amici* do not dispute that this case involves a strikingly small number of challenges to the actions of the school board during the two

[17] The analysis of *Spangler* by respondents and their *amici* truly is extraordinary. The NAACP claims (NAACP Br. 24) that reliance upon *Spangler* is misplaced because in that case "it was undisputed that the school board's initial implementation of a court-approved plan had attained the objective of a racially-neutral attendance pattern." In light of respondents' concession in both lower courts that the 1969 order effectively desegregated the DCSS in the area of student assignment and the district court's finding that their concession was warranted by the record, the NAACP's reasoning inadvertently (to be sure) demonstrates just how on point *Spangler* really is.

Respondents suggest that *Spangler* must be limited to the situation where the school board has failed to comply with its obligations in the area of faculty hiring—because hiring has much less to do with student assignment than faculty placement. But that is nonsense. There is nothing in the Court's analysis in *Spangler* that supports limiting the case in this way. See U.S. Br. 18-19.

decades that the desegregation decree has been in effect. See Pet. Br. 3-14 (describing history of proceedings involving interpretation and modification of desegregation decree since 1969). What is more, this case involves an even smaller number of instances where the school board engaged in even technical non-compliance with the dictates of the district court. In fact, none of the opinions of the district court—which are reproduced fully in the joint appendix (J.A. 61-253)—reflects even a hint of defiance or of bad-faith refusal to implement the court's orders. At worst, the disputes underlying those decisions reflect good-faith disagreements about how best to accomplish the remedial purposes of the decree and how to reconcile the terms of the decree with the legitimate educational goals of the school district when they occasionally collided with those purposes. Nothing in that record of compliance supports the court of appeals' attempt to impose new and concededly "bizarre" affirmative remedies in order to achieve perfect racial balance in student assignment.

CONCLUSION

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be vacated.

Respectfully submitted,

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